BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

FILED
6-28-16
04:59 PM

Order Instituting Investigation And Order to Show Cause on the Commission's Own Motion into the Operations and Practices of Pacific Gas and Electric Company with Respect to Facilities Records for its Natural Gas Distribution System Pipelines.	Investigation 14-11-008 (Filed November 20, 2014)

CITY OF CARMEL-BY-THE-SEA'S APPEAL OF THE PRESIDING OFFICER'S DECISION

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June 28, 2016

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I. INTRODUCTION

Pursuant to the California Public Utilities Commission's (Commission) Rules of Practice and Procedure (Rules) Rule 14.4, the City of Carmel-by-the-Sea (Carmel) respectfully appeals the Presiding Officer's Decision (POD) submitted June 1, 2016.

This is an investigation initiated by the Commission to scrutinize Pacific Gas and Electric Company's (PG&E) recordkeeping practices for its gas distribution systems and specifically whether its recordkeeping obligations were breached in several specific gas leak incidents. While Carmel supports many conclusions reached, several portions of the POD make critical missteps in its recordkeeping compliance analysis and application of fines. It ignores factual evidence, diverges from precedent, and provides a novel characterization of "systemic" and "isolated" violations not found in the statutory scheme of Commission fines.

The POD concludes PG&E violated state and federal law, but incorrectly applied the corresponding fines. Fines promote safety through deterrence, both for the utility and for the industry. Should the Commission agree with the POD's conclusions and calculations, it would set a low threshold for gas distribution pipeline recordkeeping compliance. This proceeding would thus have no lasting value, because it will not effectuate the Commission's desired deterrence and improved recordkeeping practices not just for PG&E but for all utilities in this

State.

II. ARGUMENTS

A. The POD Erroneously Concluded PG&E's "Over 99% Safe" Distribution Pipeline System Requires no Improvement.

The POD states that PG&E's gas distribution system is safe because the incidents at issue amount to a small fraction of PG&E's overall pipeline maintenance and in general, PG&E follows the law in its recordkeeping obligations.[1] The POD reasons: "A system that works over 99% of the time is not a *system* in need of improvement."[2] In fact, the POD borrowed wording from PG&E's brief in its conclusion that gas leaks addressed in this proceeding were mere "deviations" from "general compliance."[3] This conclusion commits legal error because it ignores evidence on the misleading nature of this statistic and ignores evidence that PG&E's recordkeeping practices contain larger flaws beyond the specific gas leaks investigated here.

The Safety and Enforcement Division (SED) identified deep flaws in PG&E's recordkeeping, including a recent PG&E Commission filing that identified 390 mapping error corrections within a six-month period.[4] The Utility Reform Network (TURN) cited to evidence that showed that PG&E's recordkeeping violations extended beyond the particular incidents, which included maps and records that have suffered "years of neglect, leading to a situations in which maps are inaccurate and records are incomplete...contribut[ing] to numerous incidents, some serious."[5] Carmel explained the .001 error rate discussed in the POD is misleading because it only reflects gas leaks in which PG&E was required by law to report to the Commission.[6] The POD's comfort in a system purportedly "over 99% safe" also ignores evidence that PG&E identified close to 5,000 mapping corrections submitted through its

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[1] POD at 25, 45.

[2] *Id.* at 45.

[3] POD at 25; PG&E brief at 10, 14-15.

[4] SED brief at 7, citing Ex. 31.

[5] TURN brief at 2, citing Ex. 1 at 74.

[6] Carmel reply brief at 2-3.

Corrective Action Program (CAP) during a short 2-year period.[7] The POD's conclusion is not based on the record, ignores critical evidence to the contrary, and makes assumptions not in evidence.

The POD also commits legal error because it ignores Commission precedent. PG&E made the same "overall, our system is fine" argument adopted in the POD in the San Bruno proceedings, which the Commission rejected. For example, PG&E argued that its practices were reasonable and "stood out from the pack" when compared with other gas utilities.[8] The Commission rejected this argument as irrelevant for purposes of determining PG&E's recordkeeping violations. The Commission determined it need not consider whether PG&E's actions were "reasonable" by comparison, adding that the record failed to show that committing violations of law is an industry practice.[9]

Even if the Commission agrees that "over 99% safe" is an accurate measure of PG&E's recordkeeping compliance, it cannot conclude PG&E runs a safe system. Within the past ten years, PG&E's faulty recordkeeping has contributed to gas explosions in Rancho Cordova, San Bruno, Carmel, among others, which have killed nine people, injured dozens of people, caused millions of dollars in damage, and destroyed up to 45 homes. PG&E is in the business of providing flammable gas which runs under our streets and into our homes, where our families eat and sleep. The Commission must demand more from PG&E; it has chosen to operate a dangerous gas pipeline system where proper oversight is imperative to customer safety. A known error rate of even .001% over a large service territory would have Californians playing a game of Russian roulette, risking loss of life or property. The global airline industry operates a larger, highly complex and critical transportation system. According to the website "Statistic Brain" (www.statisticbrain.com/airplane-crash-statistics/) the odds of a fatality on a single airline

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[7] *Id.* at 3.

[8] D.15-04-021, *Modified Presiding Officer's Decision Regarding Allegations of Violations Regarding [PG&E's] Operations and Practices with Respect to Facilities Records ford its Natural Gas Transmission Systems Pipelines,* 2015 WL 1687668 (Cal.P.U.C.) at *86.

[9] *Id.*

flight is 1 in 29.4 million. An error rate for a gas system-far less complex than aviation- of .001% in nothing to be proud of whatsoever.

B. The POD Commits Legal Error in its Misapplication of Public Utilities Code Section 2108.[10]

The POD concluded that PG&E violated three statutes for each of the 19 gas leak incidents: 1) 49 C.F.R section 192.605(b) for failing to maintain necessary records as part of proper oversight procedures; 2) 49 C.F.R. section 192.603(b)(3) for failing to provide proper records to on site operating personnel; and 3) Section 451 in failing to "promote safety, health, comfort, and convenience of its patrons, employees, and public" with its incomplete and inaccurate records.[11] With respect to PG&E's failure to possess accurate and complete records, it is logical to conclude PG&E violated the law every day it failed to maintain proper service records for the pipelines at issue, i.e., a continuing violation of 49 C.F.R section 192.605(b) and Section 451 for every day the records were missing or inaccurate. In other words, PG&E's failure to provide operating personnel with the proper records was a one-time violation, but its failure to properly and safely maintain correct maps and service records continued day-to-day until cured.[12]

1. <u>There is No Discussion of Why a Daily Fine was Not Applied to Records Missing Over Long Periods of Time.</u>

The POD presents SED's evidence supporting the application of a continuing fine, but curiously stops short of discussing or applying it.[13] It is unclear why the POD did not include a discussion of Section 2108; this omission was a critical misstep. The undisputed fact is that PG&E failed to retain critical service records and maps for a long span of time.

Section 2108 provides: "Every violation by any corporation or person is a separate and distinct offense, and in the case of a continuing violation each day's continuance thereof shall be

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[10] All further statutory references are to the Public Utilities Code, unless otherwise stated.

[11] POD at 47-48.

[12] Section 2108.

[13] POD at 45-46.

a separate and distinct offense." With respect to Carmel, it is undisputed that PG&E cannot show that it ever had an accurate map or retained its service records for the plastic insert at Guadalupe and 3rd Avenue. The only means to determine the pipe's installation date was by the date stamped on the pipe itself. PG&E thus failed to possess an accurate map and records for this segment of pipe from the date of its insertion (conservatively December 31, 1998) to the Carmel home explosion (March 3, 2014) or 5,541 days.[14]

Carmel speculates that the POD's rationale in not applying Section 2108 daily fines to the individual incidents is because it reasons them to be "isolated" incidents as opposed to "systemic" and thus not suitable for a daily fine.[15] This characterization has no basis in neither law nor fact. Home explosions due to mapping errors may not be a "systemic" problem in PG&E's territory, but characterizing the event as isolated ignores the record. PG&E never had accurate records for the plastic insert, however, the POD calculated the fine as if PG&E only had an inaccurate map on the date of the explosion: March 3, 2014. The POD presents a paradox: it concludes PG&E broke that law for decades, but only fines it for one day.

2. The POD Failed to Follow Commission and Recent Court of Appeal Precedent Regarding Continuing Fines.

The POD's failure to apply continuing violations is not discussed, but its "isolated" event characterization appears in accord with discredited arguments proffered by PG&E in prior proceedings. In *Pacific Gas and Electric Company v. California Public Utilities Commission* (2015) 237 Cal.App.4th 812, PG&E argued in part that the Commission erred in ordering a continuing fine for each day it failed to correct a mistake discovered in its Commission filing regarding a pipe's maximum allowable pressure. PG&E argued a continuing violation must have a defined start and end date, characterized by a continuing course of unlawful conduct, as opposed to the continuing ill effects of the original violation.[16] The Court of Appeal rejected

[14] SED Investigation Reports at 19, 25, attached to Order Instituting Investigation and Order to Show Cause filed November 20, 2014 (OII).

[15] *Id.* at 23-25.

[16] *Pacific Gas and Electric Company v. Public Utilities Commission* (2015) 237 Cal.App.4th

PG&E's argument and affirmed the fine in full. It explained that PG&E relied on common law definitions of continuing violations, while the Commission's authority to administer fines is based in statute. Section 2108 authorizes the "regulatory agency to impose monetary penalties for persistent noncompliance with its orders."[17] "If accepted, PG&E's 'failure to correct a wrong' approach would eviscerate the Commission's power to require continual self-reporting by virtually destroying the Commission's power of noncompliance."[18] The Court also noted that PG&E's reading of the statute would reward parties who succeed in misleading the Commission through its noncompliance, adding: "This is another outlandish [PG&E] outcome we must reject."[19]

PG&E argued the same "only positive acts" requirement for continuing violations in the San Bruno proceedings, which the Commission rejected.[20] This included PG&E's citations to the same common law cases, which the Court of Appeal rejected as inapplicable for this regulatory agency's statutory authority to issue administrative fines.[21] The San Bruno decisions explained that when a utility operates a gas pipeline without the required information, it commits a continuing violation.[22] With respect to PG&E's obligation for recordkeeping, the Commission also found that PG&E failed to maintain pipeline service records required by federal law.[23] The Commission's reasoning is multi-faceted, but a portion must be quoted at length:

> "We do not find [PG&E's] arguments to have merit. PG&E frames the violation as the loss of a single record (individual document), which would lead to a document being missing over a period of time. However, the failure to preserve a

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812, 854-856 (CPUC).

[17] *Id.* at 856.

[18] *Id.* at 857.

[19] *Id.*

[20] *See e.g.,* D.15-04-024, *Decision on Fines and Remedies to be Imposed on [PG&E] for Specific Violations in Connection with the Operation and Practices of its Natural gas Transmission System Pipelines,* 2015 WL 1687684 (Cal.P.U.C.) at *89-90.

[21] *Id.; CPUC, supra,* 237 Cal.App.4th at 854-856.

[22] D.15-04-024 at *90.

[23] D.15-04-021 at *34.

> required record would mean that PG&E is missing information (e.g., pipe specifications, operating history, or maintenance history) required by regulations or statute relevant to the safe operations of its transmission systems. If a recordkeeping deficiency is not cured, PG&E's failure to comply with recordkeeping requirements would continue over a period of time. As PG&E is well aware, the Commission has consistently relied on Pub. Util. Code § 2108 for assessing fines for violations that have occurred over a period of time. Thus, a recordkeeping deficiency that is not cured is properly considered a continuing violation under Pub. Util. Code § 2108."[24]

The POD commits legal error in essentially adopting PG&E's arguments which the Commission has rejected. PG&E failed to maintain the necessary service records required by law in its distribution systems over a period of time and PG&E failed to cure these omissions. The POD fails to follow the plain meaning of Section 2108 and precedent that such violation continued every day for each record that remained missing.

C. The POD Commits Legal Error in its Application of Fines for the Recordkeeping Incidents.

The POD concluded that PG&E violated three statutes in each of the gas leaks events addressed in this proceeding.[25] The law dictates that a fine in the amount of $500 to $50,000 must be applied to each violation, with the sum determined by evaluating established factors, such as the financial resources of the utility, its conduct, and the role of precedent.[26] However, the POD decided to use a different system. It applied one or two fines at a two varying sums for each event depending on whether the leak was caused by PG&E or another contractor and whether customer evacuations occurred.[27] The POD never issued three fines for any incident, despite the findings of three statutes violated. These calculations commit legal err in failing to follow established legal guidelines for Commission fines.

Whether PG&E provides an incorrect map to its own crew or to the crew of another construction company is of no consequence. the Commission should not mitigate PG&E's

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[24] *Id.*

[25] POD at 47-48.

[26] Section 2107; D.98-12-075, *Re Standards of Conduct Governing Relationships Between Energy Utilities and Their Affiliates,* 1998 WL 973742 (Cal.P.U.C.) at *14-17.

[27] POD at 49. *See* POD at 50-53 for event tabulations.

violations due to the fact that a non-PG&E excavator unsuspectingly hits an unknown pipe due to PG&E providing him with an erroneous map. Further, PG&E crews are often employed by another contractor; such as Underground Construction employed the "PG&E" crew in Carmel.[28] In all instances, the wrongdoing is the same: an inaccurate record provided to the crew in the field. The color of the crew's hardhats is not an established principle for the Commission to consider when implementing fines.[29]

The POD contains no rationale for not implementing three fines in each instance, despite a finding that PG&E violated three laws for each event. For example, even if the Commission disagrees that Section 2108 applies as presented above, at the very least PG&E should be fined $150,000 for the three recordkeeping-related laws it broke when it caused a home to explode in Carmel.[30] The POD instead only applied a $100,000 total fine for Carmel.[31] The POD presents no legal justification for these fine amounts.

D. The POD's $834.95 Daily Fine for the Missing De Anza Service Records is Arbitrary and not Based in Fact.

The POD concluded that PG&E failed to properly respond to and assess the risk of 12 years of missing service records from its De Anza facility. This failure was determined a continuing fine pursuant to Section 2108. The POD then used a strange sum – $834.95 – as the daily fine from January 1, 1979 (beginning of missing records) to December 31, 2011 (date of detection). The POD explained it used this amount because it accorded with SED's recommended $10,786,000 fine, even though SED used a detailed monthly, weekly, and daily calculation based on differing rationale.[32] The POD also explained that a lower daily fine was warranted because "the severity of harm was limited."[33] The POD commits legal err in its

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[28] SED Investigation Reports at 21, attached to OII.

[2929] D.98-12-075 at *14-17.

[30] Section 2107. The POD agreed the severity of harm in Carmel warranted a maximum fine.

[31] POD at 51.

[32] *Id.* at 37-39.

[33] *Id.* at 37.

calculation of this fine, because it fails to evaluate threats of harm caused by years of missing service records.

Since its amendment in 2012, Section 2107 provides that a violation of a Commission law or order will result in a fine from $500 to $50,000. A Commission determination of the fine must be based on several principles, including the severity of the offense.[34] The POD acknowledged this factor, but misstated it when it said: "violations which caused actual physical harm to people or property are generally considered the most severe."[35] The sentence does not end there, as the POD leads its readers to believe. The law actually states: "[V]iolations which caused actual physical harm to people or property are generally considered the most severe, *with violations that threaten such harm closely following*."[36] The POD not only mischaracterizes the legal standard, it contains no discussion of the threat of harm caused by 12 years of missing service records, as evidenced by the Mountain View incident. These omissions lead Carmel to believe that the POD misapplied the legal standard when it opted to issue a low daily fine near the statutory minimum. A proper analysis of the threat of harm warrants a higher daily fine.

Further, the number used, down to the cent, is arbitrary, borrowed from another calculation computed under different terms. It does not accord with the reasoning used in SED's calculations for the total $10,786,000 fine. The $834.95/day sum makes the fine a haphazard amount not based in fact.

E. The POD Fails to Address a Key Component of this Proceeding: Whether PG&E's Shareholders Should Pay the Cost.

This investigation identified several factors that the Commission would determine: "1) whether PG&E violated any applicable [law] regarding its gas distribution recordkeeping; 2) whether PG&E violated any other [law] linked to its distribution pipelines in PG&E's service territory; 3) the penalty for any proven violation; and 4) whether PG&E *shareholders should*

[34] D.98-12-075 at *25.

[35] POD at 19.

[36] D.98-12-075 at *25 (emphasis added).

bear the cost."[37] Both TURN and Carmel submitted arguments in support of shareholder payment of fines.[38] For example, TURN argued ratepayers should not have to pay for PG&E's malfeasance because it would disproportionately affect poorer communities.[39] The POD errs in ignoring the Commission's directive and proffers no discussion on who should pay.

F. There is no Discussion of Carmel's Proposed Remedies.

Carmel submitted evidence on the impacts this explosion had on its community, requested sanctions against PG&E for its intentional misrepresentations, identified remedies linking executive compensation to safety objectives, and sought reimbursement from PG&E for Carmel's expenses.[40] While the POD summarizes Carmel's arguments and supporting evidence,[41] it omits any subsequent discussion. The POD never once addressed, accepted, or rejected any of Carmel's proposed remedies and request for sanctions. It is akin to a court ignoring a pending motion.

In the San Bruno decisions, all four decisions addressed each parties' proposed fines and remedies, accepted or rejected each proposal, and explained why the Commission's conclusion on each point was warranted.[42] Here, the POD is silent on Carmel's proposals. Without a word of discussion, Carmel cannot evaluate whether a misapplication of fact or law occurred. By its very silence, the POD commits legal err, because the POD provides no legal or factual justification for its decision to ignore Carmel's motion for sanctions and requested remedies. A final decision in this proceeding should address *all* parties' proposals, especially a victim to PG&E's wrongdoing like the community of Carmel.

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[37] OII at 10-11 (emphasis added).

[38] TURN brief at 6-8; Carmel brief at 24-25.

[39] TURN brief at 6-7.

[40] *Id.* at 10-11.

[41] *Id.*

[42] *See e.g.,* D.15-04-024 at *68-78.

G. The "Meet and Confer" on Remedial Measures Requirement is Vague, Procedurally Deficient, and Unlawfully Prejudices Carmel.

In an apparent, hastily prepared afterthought, the POD identifies that SED and TURN proposed remedies outside of traditional fines.[43] For example, TURN proposed that the remedies ordered for PG&E's transmission pipelines in the San Bruno proceedings should also apply to here. [44] The POD neither accepts nor rejects these remedies, but orders the parties to meet and confer on these points and prepare a mutually agreeable compliance plan.[45] At the same time, the POD closes this proceeding,[46] so the POD requires the parties to meet and confer regarding a case that no longer exists. To overcome this procedural hurdle, the POD explains that perhaps the parties can continue the meet and confer process in PG&E's most recent general rate case or in Investigation 11-02-016.[47]

This meet and confer order contains multiple flaws. First, it is unclear what the parties must discuss. The POD never mentions any of the proposed remedies by name, so it is vague whether the parties must discuss all the proposed remedies or any subset thereto. The meet and confer requirement only mentions the remedies proposed by SED and TURN, so Carmel is unclear if its proffered remedies are also on the table, or are being ignored. The parties could conceivably be discussing up to 43 proposed remedies without any guidance from the Commission.[48] Clarification is necessary.

Second, Investigation 11-02-016 is closed, so the parties cannot confer in this proceeding as suggested by the POD.[49] The POD alternatively asks that the parties meet and confer in PG&E's recent ratesetting case (A.13-12-012). Forcing the parties to meet and confer in a

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[43] POD at 54.

[44] TURN brief at 3; *see also* Appendix A to POD, also identified as Appendix E to D.15-04-024.

[45] POD at 54.

[46] *Id.* at 62.

[47] *Id.*

[48] POD at Appendix A, SED Brief at 94-96; TURN brief at Appendix A; Carmel brief at 20-25.

[49] D.16-01-011 Closing Proceeding I.11-02-016, filed January 14, 2016.

separate proceeding regarding a closed proceeding is illogical and burdensome. Carmel is not a party to the ratesetting case and has no interest in moving for party status. Carmel would also not likely successfully move for party status this late in a proceeding under Rule 1.4, which was filed in late 2013. Carmel does not want to spend its limited resources to participate in a separate, complicated proceeding that has nothing to do with distribution pipeline recordkeeping. While Carmel is interested in effectuating the non-fine remedies presented, the POD places an undue burden on this small town by forcing it to participate in a separate proceeding to see those remedies come to fruition. These remedial measures should be addressed in this proceeding through a final decision.

III. CONCLUSION

While this appeal focuses on the factual and legal errors noted by Carmel, the POD was correct in many aspects. The POD got it right when it fined PG&E for its failure to properly communicate with Carmel officials after the explosion and for unilaterally cancelling a meeting about public safety with the former Mayor of Carmel. It got it right when it determined that PG&E violated federal law in failing to learn from its mistakes in the Mountain View gas leak, which could have prevented the explosion in Carmel. The POD got it right when it determined that PG&E violated federal law when it failed to property analyze the risk of 12 years' worth of services records at its De Anza facilities. The POD is also correct that PG&E violated federal and state law in each of the identified incidents.

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However, Carmel urges the Commission to adopt a final decision that addresses the issues presented above in order to adopt a just fine and proper remedies to promote deterrence. As in the case of San Bruno, if you don't know what's in the ground you cannot operate a safe system. This decision must be based on the record and in accordance with the legal calculation of fines. This explosion wreaked havoc in Carmel's community. Why was Carmel was forced into this proceeding to make sure such traumatic events do not occur in the future. This community respectfully asks that the Commission listen to its appeal and make the necessary changes to its final decision.

June 28, 2016

Respectfully Submitted,

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